

U.S. Department of Justice
Immigration and Naturalization Service

TESTIMONY

OF

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BEFORE THE

AD HOC COMMITTEE ON IRISH AFFAIRS

CONCERNING

THE DEPORTATION AND EXCLUSION OF PERSONS
WHO MAY HAVE COMMITTED
CRIMINAL OR TERRORIST ACTS

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2128 RAYBURN HOUSE OFFICE BUILDING

I am pleased to have the opportunity to present the position of the Department of Justice and the Immigration and Naturalization Service (INS) on issues involved in the deportation and exclusion of persons who may have committed criminal or terrorist acts. In recent years Congress has made the governing statutory provisions more stringent, greatly reducing the discretion formerly given to the Attorney General to take account of individual ameliorating circumstances. Congress has also regularly called for stronger and more systematic measures by the executive branch to assure the exclusion or deportation of persons in these categories. To maintain this nation's ability to use these statutory tools effectively in the worldwide struggle against terrorism of all stripes, it is essential that we apply these provisions evenhandedly, by their terms as Congress has enacted them.

Presented here is a summary of those provisions and an account of their statutory evolution. We do not address specific cases, and because of ongoing litigation and the need to protect sensitive law enforcement information, it would not be appropriate to do so.

Criminal Grounds of Exclusion and Deportation

Criminal activity has been a ground for removal of aliens since the earliest immigration control statutes. Since 1891, federal statutes have provided for the exclusion and/or deportation of persons convicted of a "crime involving moral turpitude" -- a category that includes most offenses involving violence, fraud, or wrongful appropriation of property. With limited exceptions, U.S. law has historically provided that a single crime involving moral turpitude renders an alien excludable at the border. In contrast, a single such crime might not make a lawful permanent resident deportable, if it were committed more than five years after that person's entry. The fact that a lawful permanent resident was not deportable, however, did not necessarily shield him or her from exclusion from the United States on the criminal grounds after travel and return to this nation's borders. The Supreme Court ruled in 1933 that a permanent resident who traveled outside the country was to be deemed excludable at the border on the basis of a crime committed years earlier in this country, even though the crime did not make the person deportable. *United States ex tel. Volpe v. Smith*, 289 U.S. 422 (1933).

Through much of our history, various waivers and exceptions have been available to ameliorate the operation of these criminal grounds of removal, especially for lawful permanent residents. The Immigration and Nationality Act of 1952 (INA) provided, for example, that the sentencing judge could issue at the time of sentencing a "judicial recommendation against deportation." Although the statute called this judicial act a recommendation, the law was interpreted to mean that such a ruling barred the use of that conviction as a basis for exclusion or deportation. Also, INA section 212(c) provided a waiver of most exclusion grounds, including criminal grounds, for lawful permanent residents who had been domiciled in the United States for seven years. Through judicial and administrative rulings, see *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), this waiver also became available in deportation cases. Its most important application, frequently employed after the *Francis* decision, has been to relieve seven-year lawful residents of deportation based on criminal convictions, if the immigration judge is persuaded that they have a meritorious case of hardship, rehabilitation, or other favorable factors.

To secure such a waiver, aliens typically have offered proof to the immigration judge of rehabilitation, hardship to a family if removal occurred, or other positive factors to outweigh the gravity of the deportable offense.

Beginning in the late 1980s, Congress has progressively tightened the provisions applicable to criminal aliens. The Anti-Drug Abuse Act of 1988 introduced the concept of "aggravated felonies" to the immigration laws. Initially that concept included only murder, illicit trafficking in drugs or firearms, and crimes of violence that led to a sentence of five years or more. Persons whose offenses fit that definition were made ineligible for certain waivers or forms of relief from deportation, as well as from other benefits such as naturalization. The list of crimes considered aggravated felonies has been expanded over the years, including twice in 1996, in the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The definition of "aggravated felony" in INA section 101 (a)(43) now contains 21

paragraphs and includes such offenses as commercial bribery or theft for which a one-year sentence is imposed. The threshold for making crimes of violence aggravated felonies is also a one year sentence. After IIRIRA, this threshold is not based on actual time of incarceration, but instead on the stated sentence, even if prison time is wholly suspended. Foreign offenses that fit the list also are deemed aggravated felonies, if the term of imprisonment ended within the previous 15 years. IIRIRA made the expanded list fully retroactive.

While the list of aggravated felonies was growing, Congress also progressively tightened the waivers and other exceptions available to criminals. In 1990, the section authorizing judicial recommendations against deportation was repealed. In the same year section 212(c) was made unavailable to aggravated felons who served more than five years in prison. The AEDPA made section 212(c) unavailable to all deportable aliens convicted of aggravated felonies or most other criminal offenses as well. This change closed down the possibility that lawful permanent residents who had paid their debt to society by completing their sentences could ask the immigration judge to consider their individual circumstances, including the hardship that would be visited on their spouses and children. The IIRIRA replaced section 212(c) with a closely analogous form of relief called "cancellation of deportation." It is available to a small category of criminals who had been foreclosed from 212(c) relief under AEDPA, but cancellation remains unavailable to persons convicted of aggravated felonies, no matter what their personal or family circumstances. As I indicated, the category of aggravated felons is far wider than under earlier law.

The availability of political asylum has also been restricted for persons with criminal records. The international treaties have always allowed exceptions to the obligation of protection if the asylum seeker has committed a serious nonpolitical offense, either in the country of refuge or abroad. Beginning in 1990, Congress expressly made aggravated felons, ineligible for asylum and for the related remedy of withholding of deportation (sometimes known as *nonrefoulement*). This basic restriction continues after the 1996 amendments, except that withholding is potentially available to certain aggravated felons if the sentence was for less than five years incarceration.

The net effect of the 1996 changes is that even a lawful permanent resident of many decades' standing might now be deportable for an offense that is retroactively considered an aggravated felony, even though it was not a deportable offense when it was committed. Indeed, even if many years or decades have passed since the alien finished serving the sentence, the forms of relief formerly available (principally the section 212(c) waiver) are now not applicable, no matter what evidence that LPR may have of rehabilitation, community contributions, family hardship, or even years of exemplary living after release. The overall message from Congress to INS, strongly reinforced in oversight hearings and committee reports, is resolutely to exclude or deport persons with criminal records, particularly those who have committed one of the offenses that Congress regards with such disapprobation that the crime is labeled an aggravated felony. No statute of limitations applies, and the INA now sets forth only limited circumstances in which sympathetic personal factors may be taken into account.

Grounds of Exclusion and Deportation Applicable to Terrorists

As enacted in 1952, the Immigration and Nationality Act contained several provisions dealing with the exclusion of subversive aliens. These included aliens who were coming to the United States to engage in activities prejudicial to the public interest or safety or who at any time had been members of the Communist Party or other totalitarian groups. There were no specific provisions expressly dealing with terrorists or persons affiliated with terrorist organizations. By the 1980s the application of the 1952 provisions had led to considerable controversy in both political and judicial forums.

In 1990, Congress significantly revised the deportation and exclusion provisions of the prior law, and adopted a statute better tailored to the security and foreign policy concerns of the United States as the Cold War was ending. The Immigration Act of 1990 incorporated into the INA, for the first time, specific provisions for the exclusion or deportation of any alien who "has engaged in terrorist activity." INA §§ 212(a)(3)(B), 241(a)(4)(B) (moved by IIRIRA to INA § 237(a)(4)(B)). It also contains expansive definitions of the relevant terms. The definition of "terrorist activity"

includes:

- hijacking or sabotage;
- seizing or threatening to kill, injure or continue to detain someone to compel a third person or governmental organization to take or to not take an action;
- a violent attack on an internationally protected person;
- an assassination;
- the use of a biological, chemical or nuclear device with intent to endanger an individual or cause substantial damage to property;
- the use of an explosive or firearm (other than for mere personal monetary gain) with intent to endanger individuals or cause substantial property damage;
- or any threat, attempt or conspiracy to do one of these actions.

INA § 212(a)(3)(B)(ii). The definition applies if the act was unlawful under the laws of the place where it was committed or would be unlawful under U.S. law if it had been committed here. INA § 212(a)(3)(B)(ii). There is no exception for politically motivated actions.

The definition of "engaging in terrorist activity" is also very broad. This term:

means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time

INA § 212(a)(3)(B)(iii). By statute, "engaging in terrorist activity" may include:

- the preparation or planning of a terrorist activity;
- the gathering of information on potential targets for terrorist activity;
- providing material support (a safe house, transportation, communications, funds, false identification, weapons, explosives or training);
- soliciting funds or other things of value for terrorist activity or for any terrorist organization;
- or soliciting individuals for membership in a terrorist organization, terrorist government

or to engage in terrorist activity.

INA § 2 I2(a)(3)(B)(iii).

An alien who has committed an unlawful act covered by the statute's definition of "terrorist activity" is subject to the applicable exclusion and deportation grounds forever. Even if the alien has completed serving a criminal sentence and has lived peacefully since then, the exclusion and deportation grounds continue to apply. The removal ground applies to "[a]ny alien who... has engaged in terrorist activity." The alien's motivation for the terrorist activity does not matter. Under the INA, as amended in 1990, however, in limited circumstances certain aliens who had "engaged in terrorist activity" were eligible for some forms of relief from deportation, such as suspension of deportation, asylum, and withholding of deportation.

On April 24, 1996, with the enactment of the AEDPA, Congress further strengthened INS's mandate to remove criminal and terrorist aliens. The AEDPA expanded the exclusion ground for aliens who "engage in terrorist activity" to include representatives and members of organizations designated as "terrorist organizations" by the Department of State. The Department of State is in the process of making such designations. Also, the AEDPA barred aliens who are deportable for having "engaged in terrorist activity" from most forms of relief from deportation and exclusion. Such relief includes suspension of deportation, asylum, withholding of deportation (with a narrow exception), and adjustment of status.

The AEDPA also created a new Alien Terrorist Removal Court that allows for the use of classified information, under carefully crafted procedures before Article III judges, to deport aliens, even lawful permanent residents, on the terrorist deportation grounds. Previously, the INS could use such classified information only in summary exclusion proceedings under INA § 235(c). This change further underscored the message from Congress that the removal of alien terrorists from the United States is a priority.

On September 30, 1996, Congress passed the IIRIRA. It amended the definition of "engaging in terrorist activity" in two respects: (1) by adding a new provision to include an alien who, "under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;" and (2) by providing that a representative of a foreign terrorist organization as designated by the Secretary of State is removable only if the alien "knows or should have known" that the organization is a terrorist organization. The tight limitations on relief from deportation for persons who have "engaged in terrorist activity" were left in place. In addition, IIRIRA repealed the AEDPA provision allowing, in highly limited circumstances for some members of this class, withholding of deportation (now withholding of removal) in cases of threatened persecution.

The net result is a highly stringent statutory scheme applicable to persons who meet the broad definition of having "engaged in a terrorist activity," with virtually no possibility for asylum or other relief from deportation or exclusion.

Conclusion

Congress has greatly strengthened the immigration laws relating to aliens who have engaged in criminal or terrorist activity, and has reinforced in countless ways its message to the executive branch to enforce these provisions systematically and resolutely. The INS is carrying out this Congressional mandate. Both the criminal and terrorist removal grounds apply broadly and leave little room for individual treatment of relief claims that were previously judged based on individual factors. Courts are often vigilant to assure that provisions of this type are applied evenhandedly. If these laws are to be effective tools in the United States' effort to combat international terrorism, they must be applied according to their terms in a manner unaffected by political or other considerations.